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Syarikat Panon Sdn Bhd v Zacon Engineering Works Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO 22–63 OF 2005-III
B DAVID WONG DAK WAH JC
19 APRIL 2007

C *Civil Procedure — Summary Judgment — Principles applicable — Whether fit and proper case to be disposed off under Rules of the High Court 1980 O 14 — Whether matters at issue ought to be determined after full trial*

D *Civil Procedure — Summary judgment — Previous decision of court during injunction application that there were serious issues to be tried — Whether plaintiff could now say there were no triable issues — Whether plaintiff could raise a second time in same suit an issue that has already been determined by court*

E The plaintiff claims against the defendant (1) the sum of RM1,255,195.07 in respect of Payment Certificates and (2) the sum of RM1,897,506.76 in respect of variation works and completed steel structure works. The plaintiff applied for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC'). The Deputy Registrar dismissed the plaintiff's application. The plaintiff appealed to the judge in chambers. At the hearing of the appeal, the plaintiff did not pursue the second claim
F for the sum of RM1,897,506-76, leaving only the first claim of RM1,255,195-07 on appeal. The defendant contended that by virtue of an earlier decision of the court in respect of an application by the plaintiff for an interlocutory injunction, and the position taken therein by the plaintiff, that there existed serious issues to be tried and the plaintiff could not now during the summary judgment application say that there is no triable issue.

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Held, dismissing the plaintiff's appeal with costs:

(1) The plaintiff had in an earlier application for an interlocutory injunction taken
H the position that there were serious issues to be tried. Two of the issues raised therein are relevant to the application for summary judgment (see paras 11, 14).

(2) The plaintiff is bound by what it submitted during the injunction application proceedings. Even though the nature of the application in the injunction
I proceedings was different to what was now before the court, the common features between the two requires the court to make a finding whether there are triable issues. In fact, there was nothing to prevent the plaintiff during the injunction proceedings from submitting that the defendant had no defence to the claim for RM1,255,195-07; but the plaintiff did not do so (see para 19).

(3) An ad hoc approach to litigation is not only discouraged, it infringes the principle of issue estoppel. Parties cannot raise a second time in the same suit an issue that has already been determined expressly or by necessary implication. In this regard, the court is functus officio (see para 19).

[Bahasa Malaysia summary

Plaintif menuntut daripada defendan (1) sejumlah RM1,255,195.07 berkenaan Sijil-sijil Pembayaran; dan (2) sejumlah RM1,897,506.76 berkenaan variasi kerja-kerja dan kerja-kerja penstrukturan keluli yang telah pun disempurnakan. Plaintif memohon untuk penghakiman terus di bawah A14 Kaedah-kaedah Mahkamah Tinggi 1980. Timbalan Pendaftar menolak permohonan plaintif. Plaintif merayu kepada Hakim Dalam Kamar. Semasa pendengaran rayuan, plaintif tidak meneruskan dengan tuntutan kedua untuk jumlah RM1,897,506.76, dan hanya menumpukan rayuan untuk tuntutan pertama sebanyak RM1,255,195.07. Defendan menegaskan bahawa berdasarkan keputusan terdahulu oleh mahkamah berkenaan dengan permohonan plaintif untuk injunksi interlokutori dan pendirian yang diambil oleh plaintif bahawa terdapat kewujudan isu-isu besar untuk dibicarakan, plaintif tidak boleh semasa permohonan penghakiman terus mengatakan bahawa tiada terdapat isu-isu untuk dibicarakan.

Diputuskan, menolak rayuan plaintif dengan kos:

(1) Plaintif dalam permohonan terdahulu untuk injunksi interlokutori mengambil pendirian bahawa terdapat isu-isu besar untuk dibicarakan. Antaranya ialah dua isu yang dibangkitkan ketika itu adalah relevan untuk permohonan penghakiman terus.

(2) Plaintif terikat dengan apa yang telah dihujahkan semasa permohonan prosiding injunksi. Walaupun keadaan asal permohonan dan prosiding injunksi adalah berbeza dengan apa yang ada di hadapan mahkamah ini, ciri-ciri yang sama antara kedua-duanya memerlukan mahkamah untuk membuat keputusan sama ada terdapat isu-isu untuk dibicarakan. Lagipun, tiada apa-apa yang dapat menghalang plaintif semasa prosiding injunksi untuk menghujahkan bahawa defendan tidak mempunyai pembelaan kepada tuntutan untuk jumlah sebanyak RM1,255,195-07. Tetapi plaintif tidak pula berbuat demikian.

(3) Pendekatan ad hoc kepada litigasi-litigasi bukan hanya tidak menggalakkan, ia melanggar prinsip isu estoppel. Pihak-pihak tidak boleh membangkitkan untuk kali kedua dalam guaman yang sama berkenaan isu yang telahpun diputuskan secara jelas atau dengan implikasi yang diperlukan. Dalam hal ini, mahkamah telah pun functus officio.]

Notes

For cases on principles applicable to summary judgment, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7371–7372.

Cases referred to

Abdol Mulok bin Awang Damit v Perdana Industri Holdings Bhd 2003] 4 MLJ 441 (folld)

Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor [2007] 1 CLJ 552 (dist)

Pembenaan Leow Tuck Chai & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (dist)

The Government of Malaysia v Dato' Chong Kok Lim [1973] 2 MLJ 74 (refd)

Legislation referred to

Rules of the High Court 1980 O 14 r 1

Makenda Singh Sandhu (SS Sandhu with him) (KS Sandhu Advocates) for the plaintiff.
Sim Hui Chuan (Lim Lip Tse with him) (Reddi & Co) for the respondents.

David Wong Dak Wah JC:

APPEAL

[1] Before me is an appeal against the decision of the learned Deputy Registrar in dismissing the plaintiff's application under a summons in chambers dated 10 August 2005 (encl 47) brought under O 14 r 1 of the Rules of the High Court 1980 ('the RHC') for final judgment.

(1) a sum of RM1,255,195.07 being money owing under Payment Certificate Nos 28, 29, 29(a) and 30 together with interest thereon at the rate of 12% pa from 5 April 2005 to the date of judgment and at the rate of 8% pa from the date of judgment to final payment (prayer (1)); and

(2) a sum of RM1,897,506.76 being money not certified under/or undercertified for the variation works and completed steel structure work at FRST-EL Building, together with interest thereon at the rate of 12% pa from 5 April, 2005 to the date of judgment and at the rate of 8% pa from the date of judgment to final payment (prayer (2)).

[2] The two claims together amount to the total sum of RM3.1million as stated in the Honorable Deputy Registrar's ruling.

[3] In this appeal, I am informed by counsel for the plaintiff that the second claim of RM1,897,506.76 under prayer (2) of encl 47 will not be pursued, leaving only the first claim of RM1,255,195.07 under Payment Certificate Nos 28, 29, 29(a) and 30 under prayer (1).

THE LAW

[4] As all appeals to a judge in chambers are by way of a re-hearing, I will treat this matter afresh. In dealing with an application for summary judgment, I am guided by

the principles expounded in *Abdol Mulok Awang Damit v Perdana Industri Holdings Bhd* [2003] 4 MLJ 441 at p 445, by Richard Malanjum JCA (as he then was) as follows:

> It was the contention of learned counsel for the appellant that since it was only an O 14 application all that was required of the appellant was to raise triable issues and that he should not be expected to come up with proofs as ruled by the learned judge in the court below. With respect such a submission is not entirely consistent with our current judicial trend. Bare assertion does not necessarily amount to a triable issue thereby compelling a case to go for a full trial. It may still be subject to curial scrutiny for its value. Indeed in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 CLJ 627, [1992] 1 CLJ (Rep) 14 his Lordship Mohd Azmi FCJ gave a clear guide on the approach to be adopted when he said this at p 631 (p 19):
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> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan* had this to say at p 217:
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> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.
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> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
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> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
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> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand (see *Cow v Casey and European Asian Bank AG v Punjab & Sind Bank* at p 516.)'

APPLICATION OF THE LAW

[5] Mr Mekanda Singh Sandhu (Mr Sandhu), counsel for the plaintiff, in his submission submitted that as the amount claimed of RM1,256,195.07 is made pursuant to Payment Certificates Nos 28, 29, 29(a) and 30 which are not in dispute, summary judgment ought to be given and relied on the case of *Pembenaan Leow Tuck Chai & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 ('Dr Leela's case'). From my reading of Mr Sandhu's submission, the success or failure of this application depends heavily on the applicability of the quoted case. Hence I am duty bound to look at the case in some detail. The facts were these. In that case, the contractor entered into a construction contract (using the PAM standard contract) with the employer to construct a private hospital. The architect issued a penultimate progress payment certificate for a sum RM433,288.97 which was to be paid within a certain time frame (ie within 21 days of presentation of the certificate to the employer) as per cl 30(1) of the contract read with the appendix. The employer did not make the payment but instead filed a cross-claim against the contractor for defective work and over valuation. The contractor took up an action for summary judgment under O 14of the RHC. The issue of this case centered on the question whether the employer had the right of set-off against the penultimate progress payment certificate.

[6] In delivering the judgment of the Supreme Court allowing the summary judgment for the amount claimed under the penultimate progress certificate, His Lordship Edgar Joseph Jr FCJ applied the expressio unius principle and stated at p 78:

> In our view, therefore, the express enumeration of permitted set-offs in a contract or sub-contract, can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set-offs, and nothing else, on the basis of the expressio unius principle.
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> In the present case, there are seven express provisions in the contract to which we have referred whereby the employer has the right of set-off but none of them is relevant to its alleged right to make the set-off for which it contends.
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> In our view, regard being had to these provisions of the contract, and applying the expressio unius principle, so far as claims for payment on certificates are concerned, the ordinary common law right of set-off had, in the words of Lord Salmon in the *Gilbert-Ash case* [1974] AC 689 at pp 722-723; [1973] 3 All ER 195 at p 220; [1973] 3 WLR 421 at p 448) quoted above, been extinguished, not expressly but by clear implication.

[7] Mr Sandhu in his submission referred the court to clauses 60.10 and 47.1 of the Conditions of Contract which state as follows:

> 60.10 Time for Payment
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> The amount due to the Contractor under any Interim Payment Certificate issued by the Engineer pursuant to this Clause, or to any other term of the Contract, shall, subject to Clause 47, be paid by the Employer to the Contractor within 28 days after such interim Payment Certificate has been delivered to the Employer, or, in the case of the Final Payment

Certificate... In the event of the failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest at the rate stated in the Appendix to Tender upon all sums unpaid from the date by which the same should have been paid. The provisions of this Sub-Clause are without prejudice to the Contractor's entitlement under Clause 69 or otherwise.

47.1 Liquidated Damages for Delay

If the Contractor fails to comply with the Time for Completion in accordance with Clause 48, for the whole of the Works or, if applicable, any Section within the relevant time prescribed by Clause 43, then the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default and not as a penalty (which sum shall be the only monies due from the Contractor for such default) for every day or part of a day which shall elapse between the relevant Time for Completion and the date stated in a Taking-Over Certificate of the whole of the Works or the relevant Section, subject to the applicable limit stated in the Appendix to Tender. The Employer may, without prejudice to any other method of recovery, deduct the amount of such damages from any monies due or to become due to the Contractor …

[8] Mr Sandhu then submitted that payment for interim certificates, subject to cl 47, must be effected within 28 days after the same had been delivered. And since there is no claim for liquidated damages provided for in clause 47.1 the plaintiff is entitled to judgment based on the decision of Dr Leela's case.

[9] For the defendant, Mr Sim Hui Chuan ('Mr Sim') submitted that there are numerous serious issues to be tried and hence summary judgment is not available to the plaintiff. He referred me to the proceedings before Clement Skinner J where his Lordship in an application for injunction by the defendant ('injunction application proceeding') in this case made certain findings and this is what he said:

From the totality of the facts presented to the court, I find that bona fide serious issues have been disclosed which are required to be tried. These issues may be identified as being:

(i whether the plaintiff is entitled to exclusive possession of the site of the disputed works; this issue is closely related to the next issue;

(ii whether the defendant is a trespasser or has interfered with the plaintiff's alleged rights of possession to the site of the disputed works;

(iii whether the taking over of the disputed works by the defendant was unlawful;

(iv whether the defendant is entitled to impose liquidated and ascertained damages in accordance with the sub-sub contract amounting to RM22.1m for late completion, including the disputed works taken over by it;

(v whether there is a total sum of RM3.1m owing to the plaintiff by the defendant in respect of works executed by the plaintiff. (see pp 628–629 of the report — [2005] 5 MLJ 609)

[10] In the injunction application proceeding, the plaintiff had submitted that there were serious issues to be tried and one of those issues was issue (v) set out by Clement Skinner J. As such, Mr Sim submitted that the plaintiff cannot now say that there is no triable issue in this application. In other words, the plaintiff cannot blow hot and cold. Further the plaintiff is barred by the principle of estoppel.

[11] In reply to that argument, Mr Sandhu submitted that in the injunction application proceeding, the issue of whether or not the plaintiff is entitled to immediate payments of the amounts in the interim certificates nos 28, 29, 29(a) and 30 was not adjudicated upon. They were in fact not placed before the court to be relied on by the plaintiff. Hence, he submitted that the principle of estoppel does not apply.

[12] In dealing with this appeal, my task is only to determine whether the materials before me disclose triable isues. If they do, this appeal will be dismissed.

[13] My starting point would be the judgment of Clement Skinner J in the injunction application proceeding. It cannot be disputed that in that proceeding the learned Judge found five serious issues to be tried, two of which are relevant to this application and they are for convenience reproduced here:

(i) whether the defendant is entitled to impose liquidated and ascertained damages in accordance with the sub-sub contract amounting to RM22.1m for late completion, including the disputed works taken over by it;

(ii) whether there is a total sum of RM3.1m owing to the plaintiff by the defendant in respect of works executed by the plaintiff

[14] In this application the defendant is asking for judgment for the sum of RM1,255,195,07 which is part of the RM3.1m set out in issue (v). Implicit from that would be that the claim of RM1,255,195.07 is also an issue which needs to be tried. Mr. Sim emphasised the point that it was the plaintiff who submitted that was a triable issue to be tried.

[15] For me to concede to Mr Sandhu's argument would mean that I have to disregard the findings of the learned judge in the injunction application proceeding. Can I do that?

[16] I approach the question this way. In the injunction application proceeding Mr Sandhu had to persuade the court that there were serious issues to be tried to get over the first hurdle of any application for injunction. If that hurdle cannot be crossed, then the judge need not look at the second hurdle and that is the balance of convenience test. Mr Sandhu had in that application said in his submission (pp 7 and 8 of encl 31):

> (3) Whether the defendant is entitled to impose LAD in accordance with the Sub-Sub Contract amounting to RM22,134.176 for late completion, including of the two Works taken over by it?

By para 23 of the defence and counterclaim, the defendant have alleged that the plaintiff is liable to LAD for late completion of works and breaches of Sub-Subcontract amounting to RM17,374.739.20 and have counterclaimed for this sum under prayer (3).

In response, the plaintiff contended: (1) that para 18 and/or provisions on LAD in the Letter of Acceptance is/are not enforceable in law as no rate on the liquidated and

ascertained damages is provided (paragraph 1); (2) that the defendant lost the right to impose LAD as the times for completion of the subcontracts were/are now at large (paragraph 12); (3) in the alternative, there is no basis for LAD because the defendant has not taken into account delays caused by late handover, the non-payment and/or late payment of subcontract price and variation orders and have not processed the applications for extension of time (para 13 and 14); and (4) in the further alternative, the defendant are put to strict proof of LAD imposed (para 15 of Reply).

From the positions taken by the parties it should be obvious that the disputes on LAD involve serious questions of fact and law which cannot be dismissed as frivolous or vexatious.

(4) Whether there is a total sum of RM3,152,703.83 owing by the defendant in respect of works executed by the plaintiff?

As regards the plaintiff's claim for RM3,152,703.83, it is made up of RM1,255,195.07 under Payment Certificate Nos 29, 29(a) and 30 and a claim of RM1,897,506.76 for variation works (paras 9 and 11(a) of the statement of claim).

On claim (1), the defendant has relied on an advance payment of RM4,828,000 and on an alleged running account (paras 26(b) and 26(c) of the defence and counterclaim). In respect of claim (2), the defendant had relied upon an allegation that the plaintiff objected to the certification of the variation orders (paras 27(b) and (c) of the defence and counterclaim).

By their reply, the plaintiffs have asserted, inter alia, that the sum of RM4,828.000 has been paid back in full (para 19), that there was no running account as alleged and the plaintiff has settled in full the cost of the materials (para 19) and that the variation works were instructed by the engineer, and were completed and duly accepted by the defendant (para 20).

In the above premises, the claim of the plaintiff considered in the light of the facts pleaded in paragraphs 19 and 20 of the reply, discloses a reasonable cause of action and is not frivolous.

[17] His submission succeeded. Can I now say that the issue was not argued as submitted by Mr Sandhu.

[18] In my view Mr Sandhu is bound by what he submitted in the injunction application proceeding. Even though the nature of the application in the injunction application proceeding is different to what we have before me, the common features between the two requires the court to make a finding whether there are triable issues. I cannot ignore the finding of the learned Judge in the injunction application proceeding, hence I am functus officio. In fact there was nothing stopping Mr Sandhu in the injunction application proceeding from submitting to the court that as far as the sum of RM1,255,195,07 was concerned there is no defence by the defendant and to set out the grounds for saying so. He did not do that. An ad hoc approach to litigation is not only discouraged, it infringes the principle of issue estoppel. A somewhat similar case is that of *The Government of Malaysia v Dato' Chong Kok Lim* [1973] 2 MLJ 74, where the defendant took out an application to strike out the plaintiff's statement of claim on certain grounds which was dismissed by Chang Min Tat J (as he then was). Later, the defendant took out another

application to strike out the action based on grounds different from those relied upon in his earlier summons. Sharma J when dismissing the second summons said (at p 76):

> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit (see *Peareth v Marriott* [1883] 22 Ch D 182, *Hook v Administrator-General of Bengal & Ors* 48 IA 187 and *In the matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v Tan Yew Ghee & Anor* [1936] MLJ 141). Parties cannot raise a second time in the same suit an issue that has already been determined either espressly or by necessary implication (see *Louis Dreyfus v Arunachalaayya* [1931] 58 IA 381) … The rule is that a matter which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue. A matter which might and ought to have been made a ground of attack or defence in the former application but which was not alleged as such a ground of attack or defence is for the purposes of the plea of respondent judicata deemed to have been a matter directly and substantially in issue in the former application, that is to say, though it may not have been actually directly and substantially in issue it is still regarded as, having been constructively, directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have, brought forward at the time. It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively respondent judicata. The rule of constructive res judicata is really a rule of estoppel.
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> The question now raised has already been heard and finally decided. It constitutes but a part of the prayer in the former application. It was not collaterally or incidentally but directly and substantially in issue when encl 9 was heard and decided. The answer to the matter is simple. The defendant's only remedy was by way of an appeal against the decision of Mr Justice Chang Min Tat. The matter was heard on its merits and finally decided. It is not capable of re-adjudication by the same court in the same suit. The defendant could certainly re-agitate the matter before the Federal Court if the plaintiff finally succeeds in obtaining judgment and an appeal is filed against that judgment. The law, as I understand it, is that the defendant is precluded from filing a second application in respect of a matter which, was directly and substantially in issue in the earlier application (encl 9) in this very court. If a decision has been given with respect to a matter or part of a matter in controversy between the parties by a court of competent jurisdiction it remains binding in the subsequent stages of the same proceedings in the same court and cannot be re-opened in that court. In my view an erroneous decision irrespective of whether it is on a question of law or fact operates as res judicata between the parties to it. The correctness or otherwise of a judicial decision seems to have no bearing upon the question whether it operates as res judicata or not. Until that decision is reversed or set aside on appeal its finality and binding force remain operative on the parties. (Emphasis added)

[19] Similarly here, Clement Skinner J had made a finding of fact and until that finding has been set aside, it remains binding on me. And because of this fact, Dr Leela's case in my view is distinguishable and not applicable to this case. The same reason applies to the case of *Bakti Kausar Development Sdn Bhd & Anor* [2007] 1 CLJ 552 which was submitted to the court on 16 April 2007.

[20] Even assuming I am wrong in coming to the above conclusion, in my view there are other triable issues which are:

(1) (1) Whether clause 63.3 can be interpreted to supersede clause 60.10 of the contract in so far as payment is concerned. Clause 63.3 reads as follows:

> If the Employer terminates the Contractor's employment under this Clause, he shall not be liable to pay the Contractor any further payment (including damages) in respect of the Contract until the expiration of the Defect Liability Period and there after until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum (if any) as the Engineer may certify would have been payable to him upon due completion by him after deducting the said amount. If such amount exceeds the sum which would have been payable to the Contractor on due completion by him, then the Contractor shall, upon demand, pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the Employer and shall be recovered accordingly (Emphasis added).

(2) Whether there is a running account between the plaintiff and the defendant in that payments pursuant to clause 60.10 have been submerged by the running account?

(3) Whether there could be a set off in view of the fact that there is now a claim for damages for late delivery?

[21] For all the reasons stated above, I find that there are triable issues which require a full trial to resolve. Accordingly, I dismiss this appeal with costs to be taxed unless agreed to the defendant.

Appeal dismissed with costs.

Reported by Brendan Navin Siva